

# DECISION



18871 LIEBERMAN  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-201956; B-201956.2

DATE: July 21, 1981

MATTER OF: Human Sciences Research, Inc.; Copley  
International Corporation

## DIGEST:

1. Agency determination to withdraw partial small business set-aside was proper where price of only technically acceptable small business proposal was almost double that of price of large business proposal which received essentially equal technical evaluation score.
2. Protest against agency determination to make awards on unrestricted basis is denied where partial small business set-aside was properly dissolved after receipt of best and final offers, and offerors were not prejudiced.
3. Under Bid Protest Procedures, GAO finds no procedural unfairness in agency refusal to supply protester with documents relating to basis for decision to dissolve set-aside.

Human Sciences Research, Inc. (HSR), and Copley International Corporation (Copley) protest the award of contracts under request for proposals (RFP) No. SA-RSD-81-006, issued by the Department of Commerce (Commerce). The contracts--maritime recreational fishery survey data collection in Regions I, II, III, and subregion 8 and overall survey data processing--are for 1-year with two 1-year renewal options.

We find the protests without <sup>percent</sup> merit.

The RFP was issued as "30% set-aside for small business." No indication of which regions or any specifics concerning which portion of the total requirements was to be 30 percent set aside was contained in the RFP. The RFP set-aside notice specifically provided that:

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Unrestricted Basis]

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"A portion of this procurement, as identified elsewhere in the solicitation, has been set aside for award only to one or more small business concerns. Negotiations for award of this set-aside portion will be conducted only with the referenced concerns, organizations, and individuals that have submitted responsive bids on the non-set-aside portion.  
\* \* \*

"Notwithstanding the above language no specific parts of this solicitation have been reserved for small business set-aside. Each identified separate component can be proposed on by any organization. The requirement is that in aggregate at least 30% of the dollars awarded as a result of this solicitation, will go to small businesses."

The RFP listed price as the most important evaluation criterion for all components.

- Three technically acceptable proposals were submitted. Copley, a large business, submitted proposals for Regions I and II; Market Facts, Inc. (Market), a large business, submitted proposals for all of the components solicited; and HSR, a small business, submitted proposals for Regions I and II, subregion 8, and for data processing.

Although the best and final offers submitted by those three firms were technically evaluated within a relatively close range, there were substantial price variances between the proposals. The contracting officer initially determined that Regions I, II and III should be awarded to Market and HSR awarded subregion 8 and data processing. This would have resulted in award of 31.8 percent of the dollar value of the contracts (for year 1) to a small business.

However, Commerce's legal counsel became concerned that award of the data processing component to HSR would cost \$449,590 while award to Market would cost only \$249,000. Award to HSR of either of the other two regions for which it submitted proposals would have resulted in even greater price differentials and higher total cost to the Government. The agency concluded that award of

data processing to HSR would be at an unreasonable price to the Government and, therefore, dissolution of the set-aside was required under Federal Procurement Regulations (FPR) § 1-1.706.3(b) (1964 ed. amend. 101). In addition, Commerce believed that the 30-percent partial set-aside formulation was defective, per se. This was because the solicitation did not specify a separate component part reserved for small business only, so that small businesses did not have to compete with large businesses. Commerce consulted with the Small Business Administration, which concurred with Commerce's conclusion that the partial set-aside should be dissolved.

As a result of this, Commerce withdrew the set-aside. Awards were then made as if the procurement had been unrestricted. While Commerce concluded that the appropriate course of action was to resolicit competition on an unrestricted basis, the urgency of the program requirements was such that any delay in awards would have caused severe permanent damage to vital program objectives and impact adversely on other related projects. Award of a contract for subregion 8 was made to HSR, the low priced, highest technically rated offeror, and contracts for Regions I, II, and III and for data processing were awarded to Market.

HSR, the small business, protests that the 30-percent partial set-aside formulation was proper, and that cancellation of the set-aside was arbitrary and capricious. HSR further contends that since the set-aside provision was not protested before the submission of proposals, the agency decision to withdraw the set-aside was improper under the applicable regulations which require it to consider only whether award to HSR under the set-aside would be detrimental to the public interest.

We agree with Commerce that the dissolution of the partial small business set-aside was proper under the circumstances. In view of the substantial price differential, the agency was justified in the withdrawal under FPR § 1-1.706-3(b) (1964 ed. amend. 101), which provides:

"If, prior to the award of a contract involving an individual or class set-aside for small business, the contracting officer considers the procurement of the set-aside portion from a small business concern would be detrimental to the public interest (e.g.,

because of unreasonable price), the contracting officer may withdraw either a joint or a unilateral set-aside determination. \* \* \*

Here, the contracting officer determined that while the data processing proposals were essentially technically equal, the 3-year cost of award to the small business rather than the large business would be almost double. Our Office has held that a contracting officer has broad discretion to withdraw a set-aside based on a determination of price unreasonableness. Stacor Corporation; Isles Industries, Inc., 57 Comp. Gen. 234 (1978), 78-1 CPD 68.

We also note that the nonspecific, 30-percent partial set-aside formulation appears to give rise to similar problems of indefiniteness that caused our Office to object to the use of "floating set-asides" in 41 Comp. Gen. 306 (1961). A "floating set-aside" is one in which a portion of the total overall quantity to be set aside is contained in the solicitation; but, the solicitation fails to designate which components of the requirement are to be set aside. In any case, we need not address this issue because the agency had an independent basis for dissolution of the set-aside--price unreasonableness.

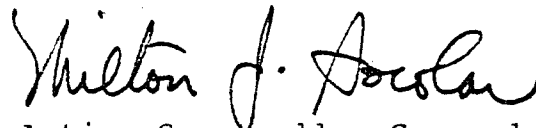
HSR has also protested the agency refusal to provide it with certain internal agency documents contained in the agency report to us, the withholding of which HSR contends is arbitrary and unwarranted. HSR further contends that its inability to obtain these documents has adversely affected its due process rights which our Bid Protest Procedures (4 C.F.R. part 20 (1980)) were intended to assure. We have refuted similar arguments in prior decisions. See, generally, Systems Research Laboratories, Inc., Reconsideration, B-186842, May 5, 1978, 78-1 CPD 341. We note that, at our request, Commerce did supply HSR with a brief summary of the omitted material.

Copley protests that Commerce, after dissolving the partial set-aside, was obligated to resolicit the entire procurement on an unrestricted basis to afford Copley and other large businesses a fair opportunity to compete.

We fail to see how Copley was denied a fair opportunity to compete or was otherwise prejudiced. It chose not to submit a proposal for either Region III or for data processing. When the set-aside was dissolved, the data processing requirement was awarded to Market instead of to HSR. While Copley argues that it would

have submitted a proposal on Region III if the entire procurement had been resolicited, it was not prevented from doing so under the original solicitation. Moreover, as indicated above, the data processing requirement was awarded to Market when the set-aside was dissolved, not the Region III requirement. The agency proposed to award Region III to Market even before the set-aside was dissolved. Finally, as to whether other large businesses were prejudiced, we point out that, aside from Copley, none has protested.

The protests are denied.

A handwritten signature in dark ink, reading "Milton J. Aroslan". The signature is fluid and cursive, with the first name "Milton" being the most prominent.

Acting Comptroller General  
of the United States